No. 11,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as The Ranch, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

Appeal from the District Court for the Territory of Alaska, Fourth Division.

BRIEF OF APPELLEES, GEORGE GILBERTSON AND HARVEY GILBERTSON.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

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STATEMENT OF CASE.

This was a suit in equity for balance of an alleged account asking for enforcement of an alleged lien under the Alaska lien statutes for work and materials, in which judgment was awarded defendants.

The answer of defendants Gilbertson denied the account and the items thereof, and charged incompetency of plaintiffs, cancellation of contracts by defendants, and completion of contracts by others, who, as the evidence shows, received compensation in the sum of $1,255.00. (R. 171.) Formal Reply by plaintiffs was filed.

ARGUMENT.

ASSIGNMENTS OF ERROR I, II AND III. (R. 46.)

(Appellants' Brief 91-95.)

Appellants complain of the action of the trial Court in sustaining three demurrers to complaints.

In this regard we answer that such rulings were harmless and were obviously beneficial to appellants in placing the *situs* of this property upon which a lien was sought within the Court's jurisdiction.

ASSIGNMENTS OF ERROR IV TO X, INC. (R. 46-58.)

(Appellants' Brief 95-112.)

On the trial no evidence was offered or introduced showing, or tending to show, that plaintiffs in the ordinary course of business maintained or kept any dependable or reliable bookkeeping system or method of handling their accounts generally. All the plaintiffs could show in that regard was that they had a slip-shod manner of keeping track of the *time* claimed by workmen whom they hired. It amounted to each workman keeping his own time and reporting the

total time claimed for each day on these time cards. It contained no dependable or exact data as to materials furnished any customer. These cards were called in the evidence "time cards", and sometimes "invoices", and sometimes "tickets". (R. 104.) Some of these cards were claimed to have been initialed by the individual workmen and some had the name or names of workmen upon such card or cards.

These cards (none of which appear in the Bill of Exceptions) were nothing more than memoranda to which a witness might refer to refresh his memory, but for no other purpose. Our statute on this subject (Compiled Laws of Alaska, 1933, p. 834) reads as follows:

> "Sec. 4252. When Witness May Testify or Refresh His Memory From Writing. A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence shall be received with caution."

According to plaintiff Reed as a witness, the man in charge of the office of plaintiffs was a man named Calhoun, who was an incompetent bookkeeper. Who

he was, where he came from, and where he was on the date of trial, the evidence is entirely silent. Nothing in the way of the firm's books or book of account were produced by plaintiffs on the trial, nor was any suggestion made by appellants why said office manager Calhoun was unavailable as a witness for them. No employee of plaintiffs corroborated the testimony of either plaintiff concerning these cards.

The time cards, invoices, or tickets purporting to show a record of the time of certain workmen on the two separate contracts sued upon were of themselves insufficient as a basis of proof, even if accorded the fullest weight by the Court hearing the testimony. All objections of plaintiffs, either to their exclusion as a whole or separately, as so-called "exhibits" or to the refusal of the Court to allow their introduction if offered properly, can not avail appellants. They were each and all examined by the presiding judge and found wanting for this purpose. No error was committed by the Court in so doing. In the absence of all reliable testimony that such cards were a part of established *practice* in the regular course of business of appellants, they were entitled to no consideration except as mere memoranda.

In a matter of this kind, the laws of the state or territory where suit is tried govern the Courts on the question of evidence. Alaska has the law above quoted and we are not bound by the general laws of the United States. Our law is definite on this subject and must be controlling here, affecting, as it does, a local law on local contracts.

In *U. S. v. Summers,* 231 U. S. 92, the Supreme Court has held that our criminal code must be given force and effect throughout Alaska, that such code was designed by Congress with knowledge of conditions in Alaska, and that it is complete and circumstantial as a full criminal code in all respects. No less can be said about our Civil Code enacted at the same time, and, as such, its laws are enforceable until changed or amended in the manner provided by law.

ASSIGNMENTS OF ERROR XIII, XIV AND XV. (R. 60-61.)

(Appellants' Brief 112-117.)

Assignment XIII. It is claimed that appellants' motion to strike certain testimony as "outside of the issues" was well taken. That such testimony was well within the issues appears by reading the Answer and Reply.

Assignment XIV. By reading the testimony quoted in this Assignment, it will be seen that the question objected to was answered before objection was made, and that the ruining and destruction of the premises was a matter in direct issue. No motion to strike the answer was made.

Assignment XV. This motion to strike was also *within the pleadings* and no question of warranty was made an issue on the trial at any time.

Counsel here seized a supposed opportunity to inject their personality into the brief by making some unsound deductions of their own to the effect that

appellees made no claim for damages. On page 116, they assert again a presumption as to why no such claim was made but they give the wrong reason. It may well be concluded that the reason defendants made no counterclaim for damages was because they knew it to be impossible to extract blood from a turnip.

ASSIGNMENTS OF ERROR XVI AND XVII. (R. 62-63.)

(Appellants' Brief 117-121.)

These two offers are in the same category. They are not concerned with impeaching questions or even attempts to lay the ground for impeachment. Merely a desire is indicated by plaintiffs to lead the defendants into a wild goose chase and prolong the case concerning immaterial and irrelevant matters as to which neither equity, law, nor justice would be aided thereby.

ASSIGNMENTS OF ERROR XVIII AND XIX. (R. 64-67.)

(Appellants' Brief 121-145.)

The remainder of Appellants' Brief is taken up with argument concerning matter of no consequence relative to supposed errors of the Court as to the Findings of Fact and Conclusions of Law.

These alleged errors are subdivided into: A, page 121; B, page 128; C, page 130; D, page 131; and F, pages 135 to 145. E, apparently, is omitted entirely.

On February 6, 1946 (R. 31) a motion for new trial was filed and on February 21, 1946 (R. 35), without leave of Court, an amended motion for new trial was filed. The order denying motion for new trial is found at page 40 of the Record.

These two motions for new trial are not identical but are the same in spirit and cover a multitude of assigned errors, such as we have been discussing. They take in everything done by the Court considered inimical to the interests of plaintiffs.

Yet the record shows that on March 15, 1946, when this motion, or these motions, were set and called for hearing, no appearance was made for plaintiffs. They were not present, nor were their attorneys. They defaulted. (R. 40, 197.)

We therefore submit that appellants *waived* each of said motions and are in no position now to mention the subject in their brief or anywhere else.

It is not claimed that the Court committed any abuse of discretion, which is the only ground on which appellants could stand.

The alleged grounds set up in said motion or motions are ephemeral, insubstantial, and not specific. In many instances, they concern matters raising a mere conflict in evidence as to which the trial Court found for defendants, appellees. This Court, therefore, is obliged to have the rule enforced that the trial Court's rulings thereon will not be disturbed by an Appellate Court. This certainly must be the case

where the losing party defaults and remains away from the courtroom when the hearing on such motion or motions is or are set for hearing and are heard considerately.

The Court heard and saw the witnesses and gave the entire case calm, learned, and considerate attention and its judgment should be in all things affirmed.

Dated at Fairbanks, Alaska, December 12, 1946.

Respectfully submitted,
CECIL H. CLEGG,
Attorney for Appellees,
George Gilbertson and Harvey Gilbertson.

Due service of the foregoing Brief of Appellees Gilbertson, and receipt of copy thereof, acknowledged December 12, 1946.
WARREN A. TAYLOR,
Of Attorneys for Appellants.